CASE NO. 16-1140

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, d/b/a NIFLA, et al.,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICI CURIAE MOUNTAIN RIGHT TO LIFE, BIRTH CHOICE OF THE DESERT AND HIS NESTING PLACE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI[1]

Amici are Mountain Right to Life, Inc., dba Pregnancy and Family Resource Center, Birth Choice of the Desert and His Nesting Place, which are Petitioners in *Mountain Right to Life, et. al. v. Becerra,* Supreme Court Case No. 17-211, which seeks a Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals on the same issues related to California's AB775 that are at issue in this case. As pregnancy resource centers subject to AB775, Amici will be directly affected by this Court's decision.

Because of the gravity of the threat that AB775 poses to the free speech rights of non-profit pregnancy resource centers in California, Amici want to provide this Court with

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[1] Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amici Curiae* or their counsel made a monetary contribution to the preparation and submission of this Brief. Petitioners have filed a blanket consent to the filing of Amicus Briefs in favor of either party or no party. Respondents have consented to the filing of this Brief.

additional information that will be critical to its determination of this case. Amici therefore respectfully submit this Brief to the Court.

SUMMARY OF ARGUMENT

In validating AB775's content-based compelled speech requirements using only intermediate scrutiny, the Ninth Circuit has exemplified that, to borrow from George Orwell, some fundamental rights are more fundamental than others.[2] In this case, according to the Ninth Circuit, the "fundamental right" of abortion is more fundamental than is the fundamental right of freedom of speech despite the fact that the former has only been considered fundamental for 45 years while the latter has been constitutionally established for 227. Casting aside this Court's precedents, including *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and *McCullen v. Coakley*, 134 S.Ct. 2518 (2014), the Ninth Circuit proclaimed that content-based compelled speech provisions need not satisfy strict scrutiny when they relate to abortion. *National Institute of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016) ("*NIFLA*").

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[2] "All Animals are Equal, but Some Animals are More Equal Than Others," George Orwell, ANIMAL FARM, 118 (Houghton-Mifflin 1990 ed.).

The Ninth Circuit's brazen departure from precedent is the most recent manifestation of a phenomenon that members of this Court have chronicled over the last 42 years, *i.e.*, the evolution of abortion from a "fundamental right" arising from those spelled out in the Bill of Rights to a "super fundamental right" more powerful than the explicit pre-existing rights. Through the years it has become apparent that when legitimate state interests in, *e.g.*, protecting the health of pregnant women, ensuring that those undergoing medical procedures give informed consent and requiring that minors obtain parental consent before medical treatment collide with the right of abortion, the state interests are no longer legitimate and must yield to the abortion right.

In this case, the Ninth Circuit has determined that the fundamental right of freedom of speech protected from intrusion by strict scrutiny review must yield to the right of abortion so that pregnancy resource centers can be compelled to utter state-prescribed messages promoting abortion. The Ninth Circuit's disregard for this Court's precedent and attempt to undermine the fundamental right of free speech should be rejected by this Court.

LEGAL ARGUMENT

I. THE NINTH CIRCUIT ADMITTEDLY DEFIED THIS COURT'S PRECEDENT WHEN IT ASSERTED THAT STRICT SCRUTINY DOES NOT APPLY TO CONTENT-BASED COMPELLED SPEECH WHEN IT RELATES TO ABORTION.

This Court's decision in *Reed* should have put to rest any question regarding the proper level of scrutiny for content-based speech restrictions:

> Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified *only* if the government proves that they are narrowly tailored to serve compelling state interests.

Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) (emphasis added). Both the majority and concurring opinions confirmed the firm rule that laws which are content-based on their face must satisfy strict scrutiny. *Id.*; *see also id.* at 2233 ("As the Court holds, what we have termed 'content-based' laws *must satisfy strict scrutiny*.") (Alito, J., concurring) (emphasis added); *id.* at 2234 (content discrimination is

"an *automatic* strict scrutiny trigger, leading to almost certain legal condemnation" (Breyer, J., concurring) (emphasis added)); *id.* at 2236 ("Says the majority: When laws single out specific subject matter, they are 'facially content based'; and when they are facially content based, *they are automatically subject to strict scrutiny*." (Kagan, J., concurring) (emphasis added)).

This Court has permitted limited exceptions to strict scrutiny review of content-based speech restrictions, *i.e.*, incitement to lawless action, obscenity, defamation, child pornography, speech integral to criminal conduct, "fighting words," fraud and true threats. *United States v. Alvarez*, 567 U.S. 709, 717 (2012). Conspicuously absent from that list is content-based speech restrictions related to abortion. In fact, this Court put that idea to rest in *McCullen*, 134 S.Ct. at 2530. While the Massachusetts abortion buffer zone speech restriction was found to be content-neutral and subject to only intermediate scrutiny, this Court explained that if the statute were content-based, then it would have to survive strict scrutiny. *Id.* As was true in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Gonzales v. Carhart*, 550 U.S. 124 (2007), this Court did not announce that abortion related restrictions were an exception to the rule.

In fact, not only did the *Casey* court not adopt a lower level of scrutiny, but it actually affirmed that abortion regulations must be subjected to strict scrutiny. *Casey*, 505 U.S. at 926 (Blackmun, J., concurring and dissenting).

> Today, no less than yesterday, the Constitution and decisions of this Court require that a State's abortion restrictions be subjected to the strictest of judicial scrutiny. ***Our precedents and the joint opinion's principles require us to subject all non-de-minimis abortion regulations to strict scrutiny.*** Under this standard, the Pennsylvania statute's provisions requiring content-based counseling, a 24-hour delay, informed parental consent, and reporting of abortion-related information must be invalidated.

Id. (emphasis added).

> The Court has held that limitations on the right of privacy are permissible only if they survive "strict" constitutional scrutiny—that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is

> both necessary and narrowly tailored to serve a compelling governmental interest. *Griswold v. Connecticut*, 381 U.S. 479, 485, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965). We have applied this principle specifically in the context of abortion regulations. *Roe v. Wade*, 410 U.S., at 155, 93 S.Ct., at 728.

Id. at 929.

> *Strict scrutiny of state limitations on reproductive choice still offers the most secure protection of the woman's right to make her own reproductive decisions, free from state coercion. No majority of this Court has ever agreed upon an alternative approach.*

Id. at 930 (emphasis added). *Casey* dealt with content-based requirements aimed at discouraging abortion, *id.*, and AB775 deals with content-based requirements aimed at directing women toward free and low cost abortions. However, that distinction is constitutionally irrelevant if the right being protected is, as Justice Blackmun said, a "woman's right to make her own reproductive decisions, free from state coercion." *Casey*, 505

U.S. at 930. If the women of Pennsylvania have the right to decide to choose abortion free of state coercion, then *ipso facto*, the women of California have the right to decide to not choose abortion free of state coercion. AB775 interferes with that right in the same way that the content-based restrictions interfered with the right in *Casey*, and therefore should be subjected to strict scrutiny.

The Ninth Circuit agreed that neither *Casey* nor *Gonzales* established a different level of scrutiny for content-based speech restrictions in the abortion context. *NIFLA*, 839 F.3d at 838. Nevertheless, it insisted that strict scrutiny is not the proper standard for AB775, even though it is content-based, because:

> In interpreting these cases, courts have not applied strict scrutiny in abortion-related disclosure cases, even when the regulation is content-based. *See Stuart [v. Camnitz]*, 774 F.3d [238] at 248–49 [(4th Cir. 2014)] (applying intermediate scrutiny); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012) (applying a reasonableness test); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734–35 (8th

> Cir. 2008) [en banc] (applying a reasonableness test).

NIFLA, 839 F.3d at 837. In other words, according to the Ninth Circuit, it does not need to follow this Court's precedents prescribing strict scrutiny review of content-based speech provisions, even in the abortion context, because it and other lower courts have applied lower standards. *Id.* at 837-38.

However, even the other circuit court decisions it cites do not support the Ninth Circuit's conclusion. In fact, *Lakey* and *Rounds* recognized that state regulations which compel ideological speech as opposed to merely regulating medical practice are subject to strict scrutiny. *Lakey*, 667 F.3d at 576; *Rounds*, 530 F.3d at 734–35. In *Rounds*, the Eighth Circuit, sitting *en banc* clarified that *Casey* and *Gonzales* establish that the State cannot compel an individual simply to speak the State's ideological message. 530 F.3d at 734–35. Similarly, in *Lakey*, the Fifth Circuit confirmed that laws which compel "ideological" speech trigger First Amendment strict scrutiny. 667 F.3d at 576.

In this case, requiring that pregnancy resource centers devoted to providing pregnant women with alternatives to abortion conspicuously post the message that women

can receive free and low cost abortions crosses the line from information to ideology, placing it squarely under strict scrutiny. The Ninth Circuit's attempt to circumvent this Court's unequivocal determination that content-based restrictions must survive strict scrutiny should be rejected.

II. THE NINTH CIRCUIT'S DIFFERENTIAL, MORE DEFERENTIAL TREATMENT OF ABORTION-RELATED CONTENT-BASED SPEECH REFLECTS THE "SUPER-PROTECTED" STATUS THAT HAS BEEN ACCORDED ABORTION RIGHTS, EVEN TO THE DETRIMENT OF EXPRESS FUNDAMENTAL RIGHTS IN THE BILL OF RIGHTS.

While the *Roe* court found that the right to choose whether to have an abortion was part of the fundamental right to privacy, it also said that the right is not absolute. *Roe v. Wade*, 410 U.S. 113, 155 (1973), *holding modified by Planned Parenthood of SE. Pennsylvania v. Casey*, 505 U.S. 833 (1992).

> Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the

> abortion decision; *that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant.* We agree with this approach.

Id. (emphasis added).[3] Despite the *Roe* court's

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[3] The *Roe* Court's recognition of a right to choose abortion was based in part on its observation of "a trend toward liberalization of abortion statutes [that] has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code, s 230.3." *Id.* at 140, n.37. The ALI Model Penal Code ("MPC") was also used to support the decriminalization of same-sex sodomy in *Lawrence v. Texas*, 539 U.S. 558, 572 (2003). The MPC, in turn, was based upon the now discredited research of Dr. Alfred Kinsey chronicled in SEXUAL BEHAVIOR OF THE HUMAN MALE (1948), which promoted decriminalization or reduction of punishment for most sex-based offenses, including abortion and same-sex sodomy. *See* Dr. Judith Reisman, *The Kinsey Culture: Sex-on-Demand, Abortion-on-Demand*, in BACK TO THE DRAWING BOARD, THE FUTURE OF THE PRO-LIFE MOVEMENT, 273 (Teresa Wagner, ed. 2003).

assertion that there are limitations on the right to decide whether to abort, in actuality the right has become all but absolute, and other constitutional rights and what are otherwise deemed state interests of the highest order have had to yield to the right to choose an abortion. In this case, the Ninth Circuit is continuing that trend with its insistence that content-based restrictions which are subject to strict scrutiny under *Reed* are not to be so strictly analyzed when they involve abortion. *NIFLA*, 839 F.3d at 837.

A. The Ninth Circuit Is Sacrificing Free Speech On The Altar Of Abortion Rights.

The Ninth Circuit's determination that AB775's abortion-related content-based speech restriction need not satisfy strict scrutiny is the most recent manifestation of a trend that began only shortly after *Roe* was decided, resulting in what legal scholars have called the "super protected" status of abortion.[4]

> The point of this analysis is that the justifiable limitations on first,

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[4] James Bopp Jr., Richard E. Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 BYU J. PUB. L. 181 (1989).

> fourth, and fifth amendment privacy rights are numerous and significant. The limitations allowed on the abortion right are few and insignificant. The absolute right to be secure in one's person and possessions may be abridged by getting a warrant. It may even be abridged without a warrant in certain circumstances. Nevertheless, if the state has "probable cause" to believe that it could protect both potential life and maternal health by requiring two physicians to be present at post-viability abortions, it might be prohibited from doing so. This, and the striking down of most of the abortion regulations, seems inconsistent with the permissible limits on other rights as noted above.[5]

The special treatment accorded to abortion is cogently illustrated by contrasting the regulation of the fundamental right to marry. While states may require marriages to be licensed, this Court in *Doe v. Bolton* declared that states could not require hospitals

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[5] Bopp *Id.* at 230.

performing abortions to be licensed.[6] Similarly, states may require that a couple wait three to five days from the time that a marriage license is issued until the ceremony is performed, but a pregnant woman cannot be required to wait 24 hours for an abortion.[7] States may institute residency requirements for marriage and divorce, but not for abortions.[8] States can require parental consent for minors to marry, but not for minors to get an abortion.[9] A mother cannot arrange for the adoption of her child without notifying the father, but cannot be constitutionally required to notify the father before aborting the child.[10]

The dissonance between the post-*Roe* decisions striking down virtually every proposed regulation of abortion and the non-absolute nature of the right described in *Roe* has been described by several members of the Court who have questioned the "super

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[6] *Id.* at 232, citing *Doe v. Bolton*, 410 U.S. 179, 194 (1973).

[7] *Id.*, citing *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 451 (1983).

[8] *Id.*, citing *Bolton*, 410 U.S. at 200.

[9] *Id.*, citing *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75 (1976).

[10] John Noonan, A PRIVATE CHOICE, ABORTION IN AMERICA IN THE SEVENTIES, 91 (1979), citing *Danforth*, 428 U.S. at 69.

protected" status given to abortion. For example, dissenting from the decision overturning a regulation giving the father of the unborn child a right to notice and consent before his child is killed in abortion, Justice White said:

> A father's interest in having a child perhaps his only child may be unmatched by any other interest in his life. *See Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972), and cases there cited. It is truly surprising that the majority finds in the United States Constitution, as it must in order to justify the result it reaches, a rule that the State must assign a greater value to a mother's decision to cut off a potential human life by abortion than to a father's decision to let it mature into a live child. Such a rule cannot be found there, nor can it be found in *Roe v. Wade, supra*. These are matters which a State should be able to decide free from the suffocating power of the federal judge, purporting to act in the name of the Constitution.

Danforth, 428 U.S. at 93 (White, J. dissenting).

> Missouri has a law which prevents a woman from putting a child up for adoption over her husband's objection, Mo.Rev.Stat. §453.030 (1969). This law represents a judgment by the State that the mother's interest in avoiding the burdens of child rearing do not outweigh or snuff out the father's interest in participating in bringing up his own child. That law is plainly valid, but no more so than s 3(3) of the Act now before us, resting as it does on precisely the same judgment.

Id. at 94. Justice White further noted the disconnect between the majority's striking down of a provision requiring parental consent before minors can have abortions and the purported purpose of the right announced in *Roe*.

> But the purpose of the parental-consent requirement is not merely to vindicate any interest of the parent or of the State. The purpose of the requirement is to vindicate the very right created in *Roe v. Wade, supra* the right of the pregnant woman to decide "whether *or not* to terminate her

> pregnancy." 410 U.S., at 153, 93 S.Ct., at 727 (emphasis added). The abortion decision is unquestionably important and has irrevocable consequences whichever way it is made. Missouri is entitled to protect the minor unmarried woman from making the decision in a way which is not in her own best interests, and it seeks to achieve this goal by requiring parental consultation and consent. This is the traditional way by which States have sought to protect children from their own immature and improvident decisions; and there is absolutely no reason expressed by the majority why the State may not utilize that method here.

Id. at 94-95 (emphasis in original).

In *Thornburgh*, Justice White again expounded on the dissonance between the nature of the abortion right described in *Roe* and the Court's post-*Roe* invalidation of abortion restrictions.

> One searches the majority's opinion in vain for a convincing reason why the apparently laudable policy of promoting informed consent becomes unconstitutional when the

subject is abortion.

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 799 (1986) (White, J., dissenting).

> [F]or the ostensible objective of *Roe v. Wade is not maximizing the number of abortions, but maximizing choice.* Moreover, our decisions in *Maher, Beal,* and *Harris v. McRae*[11] all indicate that the State may encourage women to make their choice in favor of childbirth rather than abortion, and the provision of accurate information regarding abortion and its alternatives is a reasonable and fair means of achieving that objective.

Id. at 801-02 (emphasis added). Then Chief Justice Burger further explained how the right to abortion in *Roe* has become a *de facto* absolute right that tramples on other fundamental rights:

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11 *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977).

In short, every Member of the *Roe* Court rejected the idea of abortion on demand. The Court's opinion today, however, plainly undermines that important principle, and I regretfully conclude that some of the concerns of the dissenting Justices in *Roe*, as well as the concerns I expressed in my separate opinion, have now been realized.

The extent to which the Court has departed from the limitations expressed in *Roe* is readily apparent. In *Roe*, the Court emphasized

> "that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman...." [410 U.S.] *Id.*, at 162, 93 S.Ct., at 731.

Yet today the Court astonishingly goes so far as to say that the State may not even require that a woman contemplating an abortion be

provided with accurate medical information concerning the risks inherent in the medical procedure which she is about to undergo and the availability of state-funded alternatives if she elects not to run those risks. Can anyone doubt that the State could impose a similar requirement with respect to other medical procedures? Can anyone doubt that doctors routinely give similar information concerning risks in countless procedures having far less impact on life and health, both physical and emotional than an abortion, and risk a malpractice lawsuit if they fail to do so?

Yet the Court concludes that the State cannot impose this simple information-dispensing requirement in the abortion context where the decision is fraught with serious physical, psychological, and moral concerns of the highest order. Can it possibly be that the Court is saying that the Constitution forbids the communication of such critical information to a woman? *We have apparently already passed the point at which abortion is available*

> *merely on demand. If the statute at issue here is to be invalidated, the "demand" will not even have to be the result of an informed choice.*

Id. at 783-84 (Burger, C.J., dissenting) (emphasis added). Justice O'Connor added that:

> Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion.

Id. at 814 (O'Connor, J. dissenting).

> [Section] 3205(a)(1)(iii) requires that the woman be informed, "when medically accurate," of the risks associated with a particular abortion procedure, and § 3205(a)(1)(v) requires the physician to inform the woman of "[t]he medical risks associated with carrying her child to term." *This is the kind of balanced information I would have thought all could agree is relevant to a woman's informed consent.*

Id. at 830 (emphasis added) (citations omitted). The rejection of the informed consent provision in *Thornburgh* was "further evidence of the super-protected nature of the abortion right."[12]

While a plurality of the *Casey* court overruled *Thornburgh* with respect to the unconstitutionality of a 24-hour waiting period and parental consent, it sustained the invalidity of spousal notification and, most importantly, upheld the "central holding" of *Roe* that the abortion decision is a fundamental right. *Casey,* 505 U.S. at 879-900 (plurality decision). Other members of the Court, including Justice Blackmun, the author of the majority opinion in *Roe*, argued that the restrictions in the Pennsylvania statute invalidated in *Thornburgh* remained invalid in *Casey*, thus confirming the continuing preferred status of the purported right to choose abortion. *See id.*, at 918-21 (Stevens, J., concurring and dissenting); 933-40 (Blackmun, J., concurring and dissenting). As Justice Scalia said, the abortion decision should not be a liberty interest protected by the Constitution because "1) the Constitution says absolutely nothing about it, and 2) the longstanding traditions of American society have permitted it to be legally proscribed." *Id.* at 980 (Scalia, J., dissenting).

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12 Bopp, *The Right to Abortion,* at 294.

Nevertheless, this Court and lower appellate courts, including the Ninth Circuit here, continue to afford abortion that preferred status, "bend[ing] the rules when any effort to limit abortion, or *even to speak in opposition to abortion,* is at issue." *Stenberg v. Carhart*, 530 U.S. 914, 954 (2000) (Scalia, J., dissenting) (emphasis added). That includes rules regarding standing, res judicata and severability. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Thomas, J. dissenting). "[T]oday's decision perpetuates the Court's habit of applying different rules to different constitutional rights—especially the putative right to abortion." *Id.* "This suit is possible only because the Court has allowed abortion clinics and physicians to invoke a putative constitutional right that does not belong to them—a woman's right to abortion." *Id.* at 2321-22. The "Court has shown a particular willingness to undercut restrictions on third-party standing when the right to abortion is at stake." *Id.* at 2322. The special status of abortion also means doctrines such as *res judicata* and severability are relaxed or disregarded. *Id.* at 2330 (Alito, J. dissenting).

> Under the rules that apply in regular cases, petitioners could not relitigate the exact same claim in a second suit. As we have said, "a

> losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise." *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 107, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991). In this abortion case, however, that rule is disregarded.

Id.

> If a statute says that provisions found to be unconstitutional can be severed from the rest of the statute, the valid provisions are allowed to stand. H.B. 2 contains what must surely be the most emphatic severability clause ever written. This clause says that every single word of the statute and every possible application of its provisions is severable. But despite this language, the Court holds that no part of the challenged provisions and no application of any part of them can be saved. Provisions that are indisputably constitutional—for example, provisions that require facilities performing abortions to follow basic fire safety measures—

> are stricken from the books. There is no possible justification for this collateral damage.

Id. at 2330-31.

Another victim of the "'ad hoc nullification machine' that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice," *i.e.* abortion, is free speech. *Hill v. Colorado*, 530 U.S. 703, 741 (2000) (Scalia J., dissenting, citing *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 785, (1994) (Scalia, J., concurring in judgment in part and dissenting in part)).

> Having deprived abortion opponents of the political right to persuade the electorate that abortion should be restricted by law, the Court today continues and expands its assault upon their individual right to persuade women contemplating abortion that what they are doing is wrong.

Id. at 741-42. "There is apparently no end to the distortion of our First Amendment law that the Court is willing to endure in order to sustain this restriction upon the free speech of abortion opponents." *Id.* at 753.

The Ninth Circuit's determination that, contrary to *Reed* and *McCullen*, the strict scrutiny required for content-based speech restrictions must give way when the speech concerns abortion illustrates the truth in Justice Scalia's observation.

As the Fourth Circuit said in a decision invalidating a Baltimore city ordinance that sought to compel pregnancy centers to speak the city's message, California's enactment of AB775 is an attempt to weaponize the First Amendment in order to promote ideology. *Greater Baltimore Center For Pregnancy Concerns, Inc., et al. v. Mayor And City Council Of Baltimore, et. al.*, No. 16-2325, slip op. at 20-21 (4th Cir. Jan. 5, 2018), 2018 WL 298142 . It is an attempt that the Ninth Circuit has sanctioned to the detriment of the First Amendment rights of California citizens.

> The abortion debate in our country has a long and bitter history. Vast disagreement on the merits has led both sides to retributive speech restrictions and compulsions. *See, e.g., Stuart*, 774 F.3d at 242. To be sure, states must have room for reasonable regulation.
>
> But there is a limit to how much they can dictate core beliefs. This

court has in the past struck down attempts to compel speech from abortion providers. *Id.* And today we do the same with regard to compelling speech from abortion foes. We do so in belief that earnest advocates on all sides of this issue should not be forced by the state into a corner and required essentially to renounce and forswear what they have come as a matter of deepest conviction to believe.

Weaponizing the means of government against ideological foes risks a grave violation of one of our nation's dearest principles: "that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." [*W. Virginia State Bd. of Educ. v.*] *Barnette*, 319 U.S. [624,] at 642 [(1943)]. It may be too much to hope that despite their disagreement, pro-choice and prolife advocates can respect each other's dedication and principle. But, at least in this case, as in *Stuart*, it is not too much to ask

> that they lay down the arms of compelled speech and wield only the tools of persuasion. The First Amendment requires it.

Id.

B. The Ninth Circuit's Deferential Review Of A Pro-Abortion Regulation Promotes A Super-Protected Right To Abortion, Not A Right To Independent Choice.

The Ninth Circuit's decision also reflects a skewing of the right announced in *Roe* in favor of promoting abortion rather than protecting "choice." As Justice White observed, the ostensible objective of *Roe* is "not maximizing the number of abortions, but maximizing choice." *Thornburgh*, 476 U.S. at 801-02. This Court has emphasized that the heart of the liberty interest announced in *Roe* is "independence in making certain kinds of important decisions." *Casey*, 505 U.S. at 859.

> While the outer limits of this aspect of [protected liberty] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government

> interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.'"

Id. (citing *Carey v. Population Services International*, 431 U.S. 678, 684–685 (1977)).

> Our cases recognize "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird, supra,* 405 U.S [438]., at 453, 92 S.Ct., at 1038 [(1972)]. Our precedents "have respected the private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944). These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.

Id. at 851. "It was this dimension of personal liberty that *Roe* sought to protect, and its

holding invoked the reasoning and the tradition of the precedents we have discussed, granting protection to substantive liberties of the person." *Id.* at 852.

In other words, it is the decision-making processes related to pregnancy, family relationships and contraception, *not merely decisions in favor of abortion*, that are to be protected against governmental interference according to *Roe*.

> Part of the constitutional liberty to choose is the equal dignity to which each of us is entitled. A woman who decides to terminate her pregnancy is entitled to the same respect as a woman who decides to carry the fetus to term.

Id. at 920 (Stevens, J., concurring and dissenting). That has not been the case, however, as this case and cases decided by this Court attest. Rather than according equal respect to the choice to have an abortion and the choice to *not* have an abortion, courts have given far greater deference to the choice to have an abortion, finding that virtually any regulation that could be said to possibly cause a women to re-think her choice to abort her child must be invalidated.

In *Akron* this Court strictly scrutinized and invalidated provisions requiring that doctors present information about the status of the pregnancy and the nature of the abortion procedure. The Court found that providing such information was an attempt by the state to interject an anti-abortion message into the doctor-patient relationship. The informed consent provision required that physicians describe the gestational age of the unborn child, the nature of the abortion procedure and the risks associated with it. This was a bridge too far according to the Court. *Akron*, 462 U.S. at 445.

> [W]e believe that § 1870.06(B) attempts to extend the State's interest in ensuring "informed consent" beyond permissible limits. First, it is fair to say that much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether. Subsection (3) requires the physician to inform his patient that "the unborn child is a human life from the moment of conception," ...
>
> Moreover, much of the detailed description of "the anatomical and physiological characteristics of the

> particular unborn child" required by subsection (3) would involve at best speculation by the physician. And subsection (5), that begins with the dubious statement that "abortion is a major surgical procedure" and proceeds to describe numerous possible physical and psychological complications of abortion, is a "parade of horribles" intended to suggest that abortion is a particularly dangerous procedure.

Id. at 444-45.

> Consistent with its interest in ensuring informed consent, a State may require that a physician make certain that his patient understands the physical and emotional implications of having an abortion. But Akron has gone far beyond merely describing the general subject matter relevant to informed consent. *By insisting upon recitation of a lengthy and inflexible list of information,* Akron unreasonably has placed "obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision." *Whalen v. Roe*, 429

U.S. 589, 604 n. 33, 97 S.Ct. 869, 879 n. 33, 51 L.Ed.2d 64 (1977).

Id. at 445 (emphasis added). In other words, according to the *Akron* Court, reciting an "inflexible" list of information about pregnancy and the abortion procedure is unconstitutional because it might cause a woman to change her mind and not have an abortion.

However, in this case, according to the Ninth Circuit, posting of multiple copies of an inflexible statement about the availability of free and low cost abortions is not unconstitutional even though it might cause a woman to change her mind and have an abortion. That is not respecting equally the woman's decision not to have an abortion or to have an abortion, as Justice Stevens alluded to in *Casey*.

The regulations invalidated in *Thornburgh* cast even further doubt on the courts' adherence to the notion that the decision to abort and the decision not to abort are equally respected. In *Thornburgh*, the Court repeated the adage that, "the State may not require the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.'" 476 U.S. at 760 (citing *Akron*, 462 U.S. at 443-44). The

regulation invalidated in *Thornburgh* required that women be told, *inter alia*, the following:

> There are many public and private agencies willing and able to help you to carry your child to term, and to assist you and your child after your child is born, whether you choose to keep your child or place her or him for adoption. The Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion. The law requires that your physician or his agent give you the opportunity to call agencies like these before you undergo an abortion.

Id. at 761. These provisions were invalidated as "nothing less than an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." *Id.* at 762.

However, in this case, similar language pointing women to free and low cost abortions was found to be constitutional. If the State cannot direct that women be told that there are agencies available to help them *not* abort their children, then it should not be able to direct

that women be told that there are free and low cost services available that will help them abort their children. If the language in *Thornburgh* represented "an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician," then the language required under AB775 should be viewed as an outright attempt to wedge the state's message encouraging abortion in the informed consent dialogue. The fact that the Ninth Circuit did not so view the AB775 language illustrates that abortion remains on its pedestal as a "super fundamental right."

The Ninth Circuit's conclusion reflects not constitutional analysis, but a value judgment that it is required to protect the right to get an abortion, not the right to make an informed decision. The Ninth Circuit is thus perpetuating the rule bending that enables abortion to maintain its status as a preferred right, even when free speech rights are at stake.

C. The Ninth Circuit's Deference To And Validation Of Onerous Requirements Placed On Pro-Life Expression Further Promote A Super Protected Right In Favor Of Abortion.

By refusing to apply strict scrutiny to AB775's content-based compelled speech provisions, the Ninth Circuit endorsed what the bill's sponsorship, legislative history and burdensome requirements show to be a state sponsored message promoting abortion targeted at what the legislative sponsor called deceptive non-profit pro-life pregnancy resource centers. Apparently counting on the continuing viability of the "ad hoc nullification machine" that distorts even First Amendment rights when abortion is involved, the state did little to mask its disdain for pro-life pregnancy resource centers and its intent to compel them to promote abortion.

From the co-sponsors of the bill, to the legislative sponsor's obvious disdain for pro-life pregnancy centers, to the onerous requirements placed upon centers, to the exemptions for centers that perform or refer for abortions, to the prohibitive fines imposed against those who will not utter the state's message, it is readily

apparent that the state sought to work with abortion providers to undermine the effectiveness of organizations seeking to provide alternatives to abortion.

1. Bill Sponsors Express Animus Toward Pro-Life Speech.

AB775 was co-sponsored by Black Women for Wellness and NARAL Pro-Choice California. (Appendix to Petition for Writ of Certiorari at 93a, *Mountain Right to Life v. Becerra,* Supreme Court of the United States Case No. 17-211 (pending) "*Mountain Right to Life* Appendix" herein). Black Women for Wellness' description of its sponsorship indicates an animus against organizations which do not support abortion and a desire to compel them to speak a pro-abortion message:

> Unfortunately, the day after our bill was signed, the *anti-choice* community sued California's state legislature over the bill. However we are confident that *their argument, which is please let us legally deceive women*, will not have

> a leg to stand on, and this law will go into effect on Jan 1, 2016.[13]

Co-sponsor NARAL Pro-Choice California expresses similar animus toward any organization that will not perform or refer women for abortions.

> Anti-choice extremists will stop at nothing. They have opened thousands of fake health-care "clinics" that lie to and mislead women to prevent them from considering abortion as an option.[14]

It is these attitudes, not a benevolent concern that women be provided with "health care information," that underlie AB775.

The legislative sponsor, Assemblyman Ted Lieu, expressed similar animus toward

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[13] Black Women for Wellness, Reproductive Justice, Reproductive FACT Act, http://www.bwwla.org/reproductive-justice-rj-policy-work/. (last visited December 20, 2017) (emphasis added).

[14] NARAL Pro-Choice California, Abortion Access, https://prochoicecalifornia.org/issue/abortion-access/ (last visited December 20, 2017).

pro-life pregnancy centers in his comments in support of the bill.

> The author contends that, *unfortunately*, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers (CPCs) in California whose goal is to *interfere with women's ability to be fully informed* and exercise their reproductive rights, and that CPCs *pose as full-service* Women's health clinics, but *aim to discourage* and prevent women from seeking abortions. The author concludes that these *intentionally deceptive* advertising and counseling practices often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care. (*Mountain Right to Life* Appendix at 90a (emphasis added)).

The legislative history offers further evidence of the state's true intent of working with NARAL and other pro-abortion organizations to quell pregnancy resource centers' efforts to counsel women about alternatives to abortion.

Crisis Pregnancy Centers. CPCs are facilities, both licensed and unlicensed, which *present themselves* as comprehensive reproductive health centers, but are commonly affiliated with, or run by organizations whose stated goal is to prevent women from accessing abortions. A 2015 NARAL Pro-Choice America report on CPCs notes that the National Institute of Family and Life Advocates (an organization with over 1,300 CPC affiliates) states on its website that it is on the front line of the cultural battle over abortion, and its vision is to provide [CPCs] with legal resources and counsel, with the aim of developing a network of life-affirming ministries in every community across the nation in order to achieve an abortion-free America. The NARAL report also sent several researchers into CPCs to receive the counseling offered, and they widely reported that they were provided with inaccurate information, including only being given information regarding the risks of abortion, being told that many women commit suicide after

having an abortion, and being told abortions can cause breast cancer.

University of California, Hastings College of Law research report. In fall of 2009 the Assembly Business, Professions and Consumer Protection Committee, concerned that CPCs throughout California were disseminating medically inaccurate information about pregnancy options available in the state, requested a report by the University of California, Hastings College of Law regarding CPCs' practices and potential legislative options for regulating them. Completed in December of 2010, "Pregnancy Resource Centers: Ensuring Access and Accuracy of Information," discusses several options for regulation of CPCs, ranging from creating new regulations, leveraging existing regulations aimed specifically at medical services, as well as creating a new statute. Because approaches that have treated CPCs and full-service pregnancy centers differently have been challenged as violating the First Amendment, the report

> concludes that the best approach to a statutory change would regulate all pregnancy centers, not just CPCs, in a uniform manner, which is the approach that this bill adopts.

(*Mountain Right to Life* Appendix at 90a-92a) (emphasis added)).

In fact, the bill did not adopt the approach of regulating all pregnancy centers in a uniform manner. Instead, it exempted those which perform or refer women for abortions:

> (c) This article shall not apply to either of the following:
> (1) A clinic directly conducted, maintained, or operated by the United States or any of its departments, officers, or agencies.
>
> (2) A licensed primary care clinic that is enrolled as a Medi-Cal provider and a provider in the Family Planning, Access, Care, and Treatment Program.

California Health and Safety Code §123472(c)(2017). The bill's sponsors claimed that the exemptions were justified because of pre-emption concerns as to the federally affiliated clinics. (*Mountain Right to Life*

Appendix at 124a). As for the Medi-Cal and FPACT Program clinics, the sponsors claimed that the exemption was justified because those facilities provide "the entire spectrum of services," *i.e.* abortions, contraceptives and other pregnancy related services, echoing the comments of the sponsors about pregnancy research centers deceiving women by not providing abortions or abortion referrals. (*Id.* at 125a).

In other words, according to the California legislature, if a clinic provides or refers for abortions then it automatically provides notice to clients about the availability of *free and low-cost* abortions. *Id.* The legislature apparently assumed that clinics which make money, in part, by performing abortions would benevolently advertise for free and low cost services at other facilities. This, of course, is not how the market works. Just because a facility offers abortions or referrals does not mean that its clients know about free and low cost services or have any less entitlement to immediate notification of the availability of such subsidies. Centers which charge for these services have an incentive to not tell clients about free and low cost services, which would cut into their income. Consequently, the need for women contemplating abortion to be informed of free or low cost abortions would arguably be greater at

these clinics than it would be at pro-life pregnancy resource centers that do not perform or refer for abortions but specifically state that they provide alternatives to abortion.

The exemption for facilities already providing abortions, therefore, does not arise from a concern about women being ill-informed about state abortion services. If it is critical that all women know that they can call a certain number and obtain information about free and low cost abortions, then the notice requirement should apply to all facilities that pregnant women might visit. Singling out for exemption those that provide abortions indicates that the state has made a value judgment that facilities which do not object to abortion are more acceptable than those that do have such objections.

These facts gleaned from the legislative history belie the state's attempt to publicly couch the purpose of the bill in neutral terms: "The purpose of this act is to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." (*Mountain Right to Life* Appendix at 77a). In reality, the law's exemptions and the pejorative discussions about "deceptive" pro-life pregnancy resource centers should remove any doubt that AB775

was specifically targeted at chilling the speech of the pro-life centers and forcing them to utter the state's message favoring abortion. This further illustrates the Ninth Circuit's continuing allegiance to the idea that abortion is a "super fundamental" right which supersedes even free speech rights.

2. The Onerous Requirements of the Required Notices Indicate an Intent to Quell Pro-Life Speech.

The true intent of AB775, *i.e.*, to chill the speech of those who will not promote abortion, is further borne out by the arduous requirements for the required notices and the steep fines imposed on those who do not comply. Again, as an acknowledgement of the preferred status of the abortion right, the requirements for the notices required by AB775 are detailed and taxing, requiring not only notices posted on walls and at entrances, but also, in the case of unlicensed centers, on all advertising, both digital and printed.

AB775 requires that pregnancy resource centers which are licensed by the state post notices with the following requirements:

(1) The notice shall state:

> "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]."
>
> (2) The information shall be disclosed in one of the following ways:
>
> (A) A public notice posted in a conspicuous place where individuals wait that may be easily read by those seeking services from the facility. The notice shall be at least 8.5 inches by 11 inches and written in no less than *22-point type.*
>
> (B) A printed notice distributed to all clients in no less than *14-point type.*

California Health and Safety Code §123472(a) (2017) (emphasis added). Pregnancy resource centers that are not licensed by the state must "disseminate to clients on site and in any print

and digital advertising materials including Internet Web sites, the following notice:

> (1) The notice shall state: "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services."
>
> (2) The onsite notice shall be a sign at least 8.5 inches by 11 inches and written in n*o less than 48-point type*, and shall be posted conspicuously in the entrance of the facility and at least one additional area where clients wait to receive services.
>
> (3) The notice in the advertising material shall be clear and conspicuous. "Clear and conspicuous" means in larger point type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language.

California Health and Safety Code §123472(b) (2017) (emphasis added). The legislature has specified that the notices must be posted at the entrance, meaning that before a person can even be seen, let alone receive a message from a center representative she must be immediately confronted with the state-mandated message that will become part of what she hears if and when she seeks services. As the photograph attached as Exhibit A reveals, a pregnant woman, or anyone, who has questions about options for an unplanned pregnancy will barely place their hands on the door handle when they are confronted with the state-mandated advertisement for free and low cost abortions. Those seeking information on the "full range" of options will immediately believe that the facility they are entering will promote abortion as an option when in fact such promotion is antithetical to the facility's core beliefs.

Both types of notices must be "in English and in the primary threshold languages for Medi-Cal beneficiaries as determined by the State Department of Health Care Services for the county in which the facility is located. *Id.* The multiple language requirement in AB775 means that centers will be required to post notices in anywhere from one to *eleven (11)*

languages.[15] In the case of centers, such as His Nesting Place, which are located in Los Angeles County and are unlicensed, *AB775 requires that they post at the entrance and waiting room eleven (11) copies (22 total) of a notice printed in 48 point type.*[16] That would require that two 8 foot by 10 foot sections of wall space be taken up by the notices. In addition, every brochure, flier, newspaper advertisement, email, social media posting and Web page would have to have 11 statements in "conspicuous" type, whatever that is interpreted to mean. For non-profit centers that do not accept any government funds, having to produce or include the statements in already limited advertising space would be cost prohibitive and would take away from funds needed to provide services to women.

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[15] *See* California Department of Health Care Services, *Threshold and Concentration Languages For Two Plan, GMC, and COHS Counties as of July 2016,* http://www.dhcs.ca.gov/formsandpubs/Documents/MMCDAPLsandPolicyLetters/APL2017/APL17-011.pdf (last visited July 26, 2017).

[16] The threshold and concentration languages listed for Los Angeles County are Arabic, Armenian, Cambodian, Chinese, English, Farsi, Korean, Russian, Spanish, Tagalog and Vietnamese. *Id.*

In addition, if the centers do not comply with the requirements, which many cannot do because of sincerely held religious beliefs, *NIFLA*, 839 F.3d at 831, then they are subject to fines of $500 for the first violation and $1,000 for *each* subsequent violation. California Health and Safety Code §123473(a) (2017) (emphasis added). The legislative sponsor of the bill called the fines "modest." (*Mountain Right to Life* Appendix, 102a, 109a, 136a). However, if a center fails to post the state-mandated message because of a religious proscription, then it faces the potential of being fined $1,000 every 30 or so days as the state notifies the center of the violation, waits 30 days and imposes the fine as required by the law. There is no cap on the fines, just a statement that they would be assessed at $1,000 for *each* subsequent violation.

Therefore a center could be perpetually fined $1,000 a month, or $12,000 a year. Such fines are certainly not "modest," particularly for non-profit organizations that rely on donations. Many of the centers would be compelled to close, thereby reducing choices available to women seeking to make informed decisions "into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Casey*, 505 U.S. at 851.

Far from equally respecting women who make the choice not to abort and women who make the choice to abort, the Ninth Circuit and the State of California are stating that the decision not to abort is due no respect. In the words of Justice Scalia, the Ninth Circuit is continuing and expanding "its assault upon their [abortion opponents'] individual right to persuade women contemplating abortion that what they are doing is wrong." *Hill v. Colorado*, 530 U.S. at 742 (Scalia J., dissenting).

Indeed, in California, those who want to talk to women about alternatives to abortion cannot do so unless they first ensure that the women know that they can call a number and get a free or low cost abortion. After delivering that message, it will be difficult for a center representative to be taken seriously when counseling the woman that she should not seek an abortion. The State of California has been used by pro-abortion activists to do their bidding by inserting political ideology into the Health and Safety Code. That should be less tolerable than was the Commonwealth of Pennsylvania's efforts to inform women of the risks inherent in abortion. *See Thornburgh*, 476 U.S. at 761-62.

CONCLUSION

The Ninth Circuit's failure to apply strict scrutiny to an admittedly content-based speech restriction because it addresses abortion conflicts with this Court's clear precedent. The Ninth Circuit's decision also perpetuates a skewed version of the right to make decisions regarding abortion that has created a "super fundamental right" which supersedes even the fundamental right of free speech.

For these reasons, this Court should reverse the decision of the Ninth Circuit.

Dated: January 15, 2018.

Respectfully Submitted,

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Exhibit A

Notices posted at Mountain Right to Life's Pregnancy and Family Resource Center In English and Spanish